No. 86-322

IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

CRAWFORD FITTING COMPANY,
CAPITAL VALVE & FITTING COMPANY, INC.,
THOMAS A. READ & COMPANY,
FRED A. LENNON and ROBERT D. JENNINGS,
Petitioners

v.

J. T. GIBBONS, INC.,
Respondent

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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REPLY BRIEF FOR THE PETITIONERS

DANDO B. CELLINI *
VICTORIA KNIGHT MCHENRY
MCGLINCHEY, STAFFORD, MINTZ, CELLINI & LANG, PC
643 Magazine Street
New Orleans, Louisiana 70130
Telephone: (504) 586-1200

ERNEST P. MANSOUR
MANSOUR, GAVIN, GERLACK & MANOS CO., L.P.A.
2150 Illuminating Building
Cleveland, Ohio 44113
Telephone: (215) 523-1500
Attorneys for Petitioners

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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SUMMARY OF THE ARGUMENT

This Honorable Court accepted certiorari of this case in order to resolve the question of whether district courts have any discretion under Rule 54(d) of the Federal Rules of Civil Procedure to tax costs, such as expert witness fees, beyond the scope of those items listed in 28 U.S.C. §§ 1920 and 1821. The trial court below awarded Petitioners as taxable costs the fees of two of the three expert witnesses used by Petitioners at trial pursuant to

its inherent equitable discretion under Rule 54(d). That decision fully comported with the jurisprudence as it has developed over the years, the language of Rule 54(d) and this Court's interpretation of that rule.

Historically, courts in equity possessed a narrow discretion to award costs beyond the scope of the cost statutes, including expert witness fees, contrary to Respondent's suggestion otherwise. Adoption of the Federal Rules of Civil Procedure effected a merger of law and equity, and afforded district courts in all cases the equitable powers previously available only in equity. This Court confirmed in *Farmer v. Arabian American Oil Company*, 379 U.S. 227 (1964) that Rule 54(d) invested in the district courts a narrow discretion to award extra-statutory costs, and reiterated that this discretion was to be sparingly exercised. Both prior to and following *Farmer*, the district courts have obeyed this mandate and there is no reason to doubt their continued ability to do so.

The Fifth Circuit below essentially equated expert witnesses with attorneys and held that awards of both are governed by the same standards. This ignores the fundamental differences between the roles of attorneys and expert witnesses in the litigation process and sets an undesirable precedent. The attorney's role is to advocate his client's position. The role of the expert witness, on the other hand, is to assist the fact finder in resolving the issues in the case. Expert witnesses are not advocates and, indeed, where such a posture is perceived, courts have discredited their testimony or rejected it outright. Trial courts should be allowed to retain their discretion to award as costs the fees of experts whose testimony assists the court and the jury to resolve the issues in the case.

Finally, an ironclad rule prohibiting trial court discretion to award expert witness fees absent prior court approval is illogical and serves no useful purpose. Crucial

expert testimony remains crucial whether that determination is made by the court before or after trial. Moreover, in many cases, a trial judge is in the best position to evaluate both the necessity of the testimony and the reasonableness of the fee after trial. The district courts should be allowed to retain their discretion to make this decision at that time and to award or disallow the fees of the expert witness as the circumstances warrant.

ARGUMENT

I. THE TRIAL COURT'S EXERCISE BELOW OF ITS INHERENT EQUITABLE POWER WAS CONSISTENT WITH THE HISTORICAL DEVELOPMENT OF THE LAW, THE LANGUAGE OF RULE 54(d), AND THIS COURT'S INTERPRETATION OF THAT RULE

The trial court below exercised its inherent equitable discretion under Rule 54(d) of the Federal Rules of Civil Procedure to award Petitioners as taxable costs the fees of two of the three expert witnesses used by Petitioners at trial, whose testimony the court found to be essential to its resolution of the case. This exercise of discretion was consistent with the historical development of the law, the language of Rule 54(d) and this Court's own interpretation of that language. The position advanced by Respondent ignores the development of the law, reduces the language of Rule 54(d) to redundancy, and essentially disregards this Court's interpretation of that Rule.

A. Equity Practice As It Evolved Over The Years Recognized The Power Of The Courts To Award Costs Above And Beyond Routine Statutory Costs

Respondent contends it "has long been settled" that the Fee Act of 1853 and its statutory successors comprise the exclusive source of authority to award costs in all cases, whether at law or in equity, and that the only discretion historically afforded courts of equity, as

opposed to courts at law, was a discretion to decline to award these statutory costs to the prevailing party, or to otherwise apportion costs. Respondent's Brief at 7-12. This contention obviously ignores the current conflict in the federal courts of appeals concerning the scope of the district courts' inherent discretion to award costs.[1] More-

[1] Three Circuit Courts of Appeals have held squarely that district courts have inherent equitable discretion to award expert witness fees as costs upon a finding that the testimony was crucial and indispensable to the resolution of the case. *United States v. City of Twin Falls, Idaho*, 806 F.2d 862 (9th Cir. 1986); *Paschall v. Kansas City Star Co.*, 695 F.2d 322 (8th Cir. 1982); *vacated on other grounds*, 727 F.2d 692 (8th Cir. 1984), *cert. denied*, 469 U.S. 872 (1984); *Robert v. S.S. Kyriakoula D. Lemos*, 651 F.2d 201 (3d Cir. 1981). Two Circuit Courts have held that district courts have no discretion to award expert witness fees as costs, except in extraordinary circumstances, and that "indispensability" is not tantamount to extraordinary circumstances. *Quy v. Air America, Inc.*, 667 F.2d 1059 (D.C. Cir. 1981); *Chicago College of Osteopathic Medicine v. George A. Fuller Co.*, 801 F.2d 908 (7th Cir. 1986). The Fifth Circuit below has denied the district courts any discretion to award expert witness fees, except in the three equitable circumstances posited in *Alyeska* for awards of attorneys' fees. The Tenth and Eleventh Circuits have categorically denied district courts the discretion under Rule 54(d) to award expert witness fees. *Cleverock Energy Corp. v. Trepel*, 609 F.2d 1358 (10th Cir. 1979); *Loughan v. Firestone Tire & Rubber Co.*, 749 F.2d 1519 (11th Cir. 1985). The Sixth Circuit has observed simply that its opinions on the matter "appear to conflict." *Murphy v. Intern. Union of Operating Engs.*, 774 F.2d 114 (6th Cir. 1985), *cert. denied*, 2106 S.Ct. 1201 (1985). The Fourth Circuit has held only that the Clayton Act's allowance of cost of suit does not permit awards in excess of § 1920 costs, but has also expressly disagreed with the decision of the Fifth Circuit below. *Barber & Ross Co. v. Lifetime Doors, Inc.*, Nos. 86-1535(L), 86-1538, *slip op.* (available on LEXIS, Glenfed Library) (4th Cir. Jan. 30, 1987). The position of the First Circuit is unclear. *Compare Bosse v. Litton Unit Handling Systems, Inc.*, 646 F.2d 689 (1st Cir. 1981) *with Gradmann & Holler GMBH v. Continental Lines*, 679 F.2d 272 (1st Cir. 1982). The Second Circuit has denied the power to award such fees without discussion of *Farmer. Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 262 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980).

over, it overlooks the development of the historical equitable powers of the district courts. Petitioners respectfully submit that Respondent has grossly understated those powers.

Petitioners have no quarrel with the statement that the Fee Act of 1853 and its statutory progeny applied in all cases, whether at law or in equity, and that the costs listed therein should be and have been routinely awarded. That statute, however, by no means operated to curtail the historic power of courts sitting in equity to award costs beyond the statutory scope in their discretion. The federal courts have regarded the equitable foundation of this power as beyond serious question. *Sprague v. Ticonic Bank*, 307 U.S. 161 (1939); *Guardian Trust Co. v. Kansas City Southern Ry. Co.*, 28 F.2d 233, 243 (8th Cir. 1928), *rev'd on other grounds*, 281 U.S. 1 (1929) ("these statutes . . . are not the exclusive source of power in the federal equity courts touching the matter of costs"); *Reconstruction Finance Corporation v. J.G. Menihan Corp.*, 111 F.2d 940 (2d Cir. 1940), *aff'd on other grounds*, 312 U.S. 81 (1941) (stating that it is within the power of the trial court at its discretion to grant additional costs); *W.F. & John Barnes Co. v. International Harvester Co.*, 145 F.2d 915, 918 (7th Cir. 1944) (holding that in equity proceedings the Fee Bill Act of 1853 did not preclude trial courts from taxing as costs all items which were "necessary and helpful to the expeditious and proper trial of the issues"); *Cleveland v. Second National Bank & Trust Co.*, 149 F.2d 466, 469 (6th Cir. 1945), *cert. denied*, 326 U.S. 775 (1945) ("[t]here is no room for doubt that an equity court may, under extraordinary circumstances, impose upon the defeated plaintiff in an equity case, the entire cost of defense notwithstanding statutory limitations upon costs to be taxed at law."); *Barber-Coleman Co. v. Withnell*, 28 F.2d 543, 545 (D.Mass. 1928) ("[i]t has been settled that costs in equity proceedings are not restricted to the items specified in the statute"); *Gotz v. Universal Products*

Co., 3 F.R.D. 153, 155 (D.Del. 1943) ("[c]osts in equity causes are not limited to the items specified in the statute); *see also Cox v. Maddux*, 285 F. Supp. 876, 882 (E.D. Ark. 1968) (court has discretionary power to award costs not mentioned in statute where approved by court as essential to proper determination of case).[2]

A review of these cases discloses that what has "long been settled" is the historic power of courts in equity to award costs above and beyond routine statutory costs. The foregoing cases uniformly recognize that power; moreover, they teach that such costs are awardable only for predominating reasons of justice, unlike statutory costs which are routinely awarded, and, indeed, were mandatorily awarded in cases at law. 10 C. Wright and A. Miller, *Federal Practice and Procedure* § 2665 (1977). As this Court early observed concerning costs awarded pursuant to the courts' equitable discretion: "They are not of a routine character like ordinary taxable costs; they are contingent upon the exigencies of equitable litigation." *Sprague v. Ticonic Bank*, 307 U.S. at 169, *quoted* in *Cleveland v. Second National Bank & Trust Co.*, 149 F.2d at 470.

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[2] In support of its specific contention that equity courts never had the power to award expert witness fees in excess of those allowed by the Fee Act (either before or after this Court's decision in *Henkel v. Chicago, St. Paul, Minn. & Omaha Ry. Co.*, 284 U.S. 444 (1932)) and that "[e]quity courts were quite clear on the matter", Brief for the Respondent at 10, Respondent relies particularly upon *Bone v. Walsh Construction Company*, 235 F. 901 (S.D. Iowa 1916) and *Cheatham Electric Switching Device Co. v. Transit Development Co.*, 261 F. 792 (2d Cir. 1919). The holdings of both of these cases, it is submitted, are premised on the more general proposition that equity courts are restricted to awards of statutory costs only, a conclusion which must be viewed against the backdrop of the host of later decisions holding otherwise and cited hereinabove, including this Court's decision in *Sprague*. Indeed, at least three of those cases specifically addressed the issue of the award of expert witness fees as costs and the courts concluded or assumed they had the power to make such an award in their discretion, although each found that the circumstances before it did not warrant the exercise of that discretion. *See* cases cited at text, *infra* at p. 7.

The dearth of cases in equity which have actually taxed expert witness fees as costs, a point played up heavily by Respondent, Respondent's Brief at 17, does not support a lack of power to render such awards, but rather highlights the scrupulous care taken by the judiciary to award such costs only where the circumstances so warrant. *See e.g., Guardian Trust Company v. Kansas City Southern Railway Company, supra* (exhaustively reviewing historical bases of the courts' equitable powers and reversing and remanding lower court's refusal based on lack of power to award expert accountant's fees as costs); *Andresen v. Clear Ridge Aviation*, 9 F.R.D. 50, 54 (D.Neb. 1949) (case in equity wherein court held that the "power to tax the items of expense presently requested *undoubtedly* exists; and the standards by which it is to be exercised have been erected with reasonable assurance," but that "the setting of the testimony in this case [did] not justify" the exercise of its discretion in favor of such an award.); *Banks v. Chicago Mill & Lumber Co.*, 106 F.Supp. 234, 237 (E.D. Ark. 1950) (equity case in which court ruled that "[w]hile I have the power to allow as costs the compensation paid to expert witnesses for their preparation and testimony, I do not feel that this is a proper case for such an allowance."). This judicial exactitude has carried forward through the present date. *See* text, *infra* at 9-10.

B. The Merger Of Law And Equity Effected By The Federal Rules Of Civil Procedure Invested Federal Courts With Their Historic Equitable Powers In All Cases

With the merger of law and equity effected by the adoption of the Federal Rules of Civil Procedure in 1938, Rule 54(d) gave federal courts in all actions the broader discretion previously afforded only to courts of equity. *Harris v. Twentieth Century Fox Film Corp.*, 139 F.2d 571, 572 n.1 (2d Cir. 1943) ("[Rule 54(d)] appears to have adopted, for all suits covered by it, the previous

federal practice in equity, according to which the trial court had wide discretion in fixing costs, a discretion not reviewable unless manifestly abused . . . ."); *see also Prashker v. Beech Aircraft Corp.*, 24 F.R.D. 305, 311-12 (D.Del. 1959) ("the Rules of Civil Procedure [are] applicable to all civil actions . . . [and] . . . there is now no distinction between equitable or legal considerations as to the discretion of the court as to costs."). This Court's opinion in *Farmer v. Arabian American Oil Company*, 379 U.S. 227 (1964), decided subsequent to the merger of law and equity, clarified and confirmed the historic equitable power of the district courts under Rule 54(d) to award costs "not specifically allowed by statute," and re-emphasized what equity courts had recognized all along--that this discretion "should be sparingly exercised". 379 U.S. at 235.

Respondent contends that the issue before this Court was squarely decided in *Henkel v. Chicago, St. Paul, Minn. & Omaha Ry. Co.*, 284 U.S. 444 (1932). Petitioners have already dealt at length with the reasons why *Henkel* has little, if any, bearing on the issue before this Court. Petitioners' Brief at 19-22. To these arguments, Petitioners add only that *Henkel* did not purport to curtail or even deal with the equitable powers of the court, and that such was the conclusion of federal courts even prior to this Court's later decision in *Farmer*. In *Swan Carburetor Company v. Chrysler Corporation*, 55 F.Supp. 794 (E.D. Mich. 1944), *rev'd on other grounds*, 149 F.2d 476 (6th Cir. 1945), *cert. denied*, 317 U.S. 692 (1942), plaintiff relied upon the *Henkel* decision to support its position that the district court lacked authority to make an award of expert witness fees as costs. In rejecting this contention, the district court remarked that: "[t]hat case involved an action at law, and it is clear that that decision is not decisive of the question of allowances of costs in equity." 55 F.Supp. at 797. *Accord, Andresen v. Clear Ridge Aviation*, 9 F.R.D. 50 at 52 (D.Neb. 1949).

The most recent federal court decisions upholding the power of the district courts to award expert witness fees as costs in appropriate circumstances have relied upon *Farmer* in so doing. *E.g., Roberts v. S.S. Kyriakoula D. Lemos*, 651 F.2d 201 (3d Cir. 1981); *Paschall v. Kansas City Star Company*, 695 F.2d 322, 338-39 (8th Cir. 1982), *vacated on other grounds*, 727 F.2d 692 (8th Cir. 1984) (*en banc*), *cert. denied*, 469 U.S. 872 (1984); *United States v. City of Twin Falls, Idaho*, 806 F.2d 862, 877 (9th Cir. 1986). These decisions have not resulted in the "massive revision" of the law portended darkly by the Respondent. Respondent's Brief at 26. Far from it, they merely reflect the long-standing powers of the court to do justice according to the circumstances of each particular case. As this Court has recognized: "The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mold each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it." *Hecht Company v. Bowles*, 321 U.S. 321 (1944).

Moreover, these decisions have not triggered an avalanche of cases in which courts routinely award expert witness fees as costs. To the contrary, as even Respondent has noted, Respondent's Brief in Opp. to Pet. at 10-11, the judicial experience has demonstrated that courts exercise this equitable discretion with the restraint mandated by *Farmer*. The experience in the Third Circuit Court of Appeals is illustrative. Since the *Roberts* decision in 1981, the reported decisions of the district courts within the Third Circuit Court of Appeals reflect that they have exercised their discretion to award expert witness fees as costs with exemplary care, and that in the isolated instance where one court did not, the appellate court stepped in and checked such abuse. *Compare Rank v. Balshy*, 590 F.Supp. 787, 801-802 (M.D. Pa. 1984) (awarding fees of "well qualified and highly skilled" experts, whose testimony "played a crucial role

in the determination of the issues and was very helpful to the court and jury") and *Fahey v. Corty*, 102 F.R.D. 751, 753-54 (D.N.J. 1983) (awarding fees of expert witness who "was indeed indispensable to the presentation of plaintiff's claimed injuries and their causation", but observing also that "[b]y no means would this Court assert that every medical witness called by a litigant is 'indispensable' because of his expertise alone") *with N.A.A.C.P. v. Wilmington Medical Center, Inc.*, 530 F.Supp. 1018, 1027 (D.Del. 1987), *rev'd on other grounds*, 689 F.2d 1161 (3d Cir. 1982), *cert. denied*, 460 U.S. 1052 (1983) (disallowing fees, finding that "[w]hile the testimony of these witnesses was helpful to the Court, it cannot hold that their testimony was crucial or indispensable to the determination of this case . . . [and] [f]urthermore, the Court is without a factual foundation for determining the reasonableness of such fees and expenses") and *Delaware Valley Citizens v. Commonwealth of Pennsylvania*, 581 F.Supp. 1412, 1432 (E.D.Pa. 1984) (denying fees "since [the expert] did not testify before this court and since this Court is unable to determine whether [his] expertise helped resolve any issue"); *see also Black Grievance Committee v. Philadelphia Electric Company*, 802 F.2d 648, 657 (3d Cir. 1986) (reversing and remanding district court's award of fees because it failed to make specific findings concerning the indispensability of the expert's testimony").

II. BECAUSE EXPERT WITNESSES ARE INTENDED PRIMARILY TO AID THE FACT FINDER, AWARDS OF THEIR FEES SHOULD BE MADE ON A DIFFERENT BASIS THAN FEE AWARDS FOR ATTORNEYS, WHOSE JOB IT IS TO REPRESENT THE CLIENT

The federal courts have traditionally drawn a line between the expense incurred to facilitate the court's consideration of the case, and expense incurred merely

to aid one party in the presentation of his side. *See Ex Parte Peterson*, 253 U.S. 300, 315-16 (1920); Stockwell, *Expert Witness Fees—A Recoverable Cost In Federal Courts?*, Ariz. L.J. 225, 228 (1982) (hereinafter cited as "Stockwell"). Under the long-standing American rule, attorneys' fees, or "solicitor-client" costs, fall into the latter category and are not ordinarily recoverable. *E.g.*, *Fleischman v. Maier Brewing Company*, 386 U.S. 714 (1967).

In *Alyeska Pipeline Service Company v. Wilderness Society*, 421 U.S. 240 (1975), this Court invoked policy considerations to create a judicial limitation upon the circumstances in which a district court can exercise its equitable discretion to award attorneys' fees to a prevailing party. Relying upon the decision of the Fifth Circuit Court of Appeals below, Respondent contends that *Alyeska* controls disposition of the issues herein, asserting baldly that "attorneys fees and expert witness fees have always been treated alike" and that "there is no valid ground for distinction." Respondent's Brief at 15. Petitioner submits that the issue before this Court cannot be so patly resolved. There are fundamental differences between the roles of the attorney and the expert witness in the litigation process, differences which strongly support diverse treatment of the awards for their respective fees.

An attorney is an advocate retained by a litigant to represent that litigant's interests as zealously as possible. The role of an expert is quite different. Rule 702 of the Federal Rules of Civil Evidence provides that "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education, may testify thereto in the form of an opinion or otherwise." This rule is a recognition that an intelligent evaluation of facts is often difficult if not impossible

without the application of scientific, technical or other specialized knowledge outside the ken of the trier of fact. Rule 702, Fed. R. Evid., Notes of Advisory Committee.

The role of the expert, therefore, is not to represent the interests of a particular litigant, but to assist the fact finder's determination of the issues in the case. *See United States v. R.J. Reynolds Tobacco Co.*, 416 F. Supp. 313, 315 (D.N.J. 1976) ("it is the very purpose of expert testimony to assist the trier of facts . . . to understand, evaluate, and decide the complex evidential materials in a case"); *United States v. 364.82 Acres of Land*, 38 F.R.D. 411, 416 (N.D. Cal. 1965) ("the expert has but one duty—the duty to use his expertise honestly and fairly so that justice may be done . . . [t]hat duty transcends any possible duty to [the lawyer who hires him]"). Indeed, often where the expert witness assumes the role of advocate, little weight has been given to his testimony and it even has been rejected outright. *See e.g., Olympia Equipment Leasing Co. v. Western Union Telegraph*, 797 F.2d 370, 382 (7th Cir. 1986), *cert. denied*, 55 U.S.L.W. 3644 (1987); *Albers v. Church of the Nazarene*, 698 F.2d 852, 858 (7th Cir. 1983) ("experts are nowadays often the mere paid advocates or partisans of those who employ and pay them, as much so as the attorneys. . . ."); *In re Air Crash Disaster at New Orleans, La.*, 795 F.2d 1230, 1233 (5th Cir. 1986) ("the trial judge ought to insist that a proffered expert bring to the jury more than the lawyer can offer in argument. . . . [i]ndeed, the premise of receiving expert testimony is that it 'will assist the trier of fact to understand the evidence or to determine a fact in issue'"); *Viterbo v. Dow Chemical Company*, 646 F. Supp. 1420, 1425 (E.D. Tex. 1986) ("where an expert becomes an advocate for a cause, he therefore departs from the ranks of an objective expert witness, and any resulting testimony would be unfairly prejudicial and misleading."); *Johnston v. United States*, 597 F. Supp. 374, 411 (D.Kan. 1984); *C. van der Lely*

N.V. v. F. Lli Maschio S.n.c., 222 U.S.P.Q. (BNA) 399, 402 (S.D. Ohio 1984)); *Deltak, Inc. v Advanced Systems, Inc.*, 574 F. Supp. 400, 405-406 (E.D. Ill. 1983), *vacated on other grounds*, 767 F.2d 357 (7th Cir. 1985); *Mobil Oil Corp. v. Filtrol Corp., et al.*, 186 U.S.P.Q. (BNA) 252, 262 (C.D. Cal. 1975).

Much has been written by courts and commentators alike about "the age-old problem of expert witnesses who are 'often the mere paid advocates or partisans of those who employ and pay them, as much so as the attorneys who conduct the suit." *Chaulk By Murphy v. Volkswagen of America, Inc.*, 808 F.2d 639, 644 (7th Cir. 1986) (Posner J., dissenting); *In re Air Crash Disaster at New Orleans, La.*, 795 F.2d at 1234 ("the professional expert is now commonplace . . . [and] spends substantially all of his time consulting with attorneys"); *Hatmakers v. Dry Milk Co.*, 29 F.2d 918, 922 (S.D.N.Y. 1929) (the expert witness is forced to become an advocate and is expected to maintain the conclusions which will best serve the interest of the litigant who employs him); Carlson, *Policing The Bases Of Modern Expert Testimony*, 39 Vanderbilt L.Rev. 577, 587 (1986); Hubert, *Safety And The Second Best: The Hazards Of Public Risk Management In The Courts*, 85 Colum. L. Rev. 277, 333 (1985) ("a Ph.D. can be found to swear to almost any 'expert' proposition, no matter how false or foolish."). This is viewed as a problem precisely because the use of the expert in such circumstances is perverted from its intended purpose. Respondent's argument is premised on the assumption that such uses of the expert witness are and should be the rule, rather than the deviation from that rule. If this Court does not roundly reject such an argument, the result will be a clear signal to the bench and the bar that this perversion has now been deemed acceptable. Petitioners respectfully submit that this Court should not implicitly sanction the use of experts as "mere paid advocates." When, as in the case

at bar, an expert witness fulfills the role for which he was intended—providing evidence which assists the court or jury, and does not merely benefit a private party in the presentation of its side of the case—the trial court should be allowed to exercise its discretion to award as costs the fees of such expert.

III. A RULE OF PRIOR COURT APPROVAL SHOULD NOT BE CONSTRUED SO AS TO PRECLUDE A DISTRICT COURT FROM EXERCISING ITS EQUITABLE DISCRETIONARY POWERS

Federal Rule of Evidence 706 provides a procedure for court appointment of expert witnesses nominated by the parties or otherwise, and 28 U.S.C. § 1920 (6) allows their fees to be taxed as costs. Respondent suggests that, unless prior court approval is obtained, district courts should be barred absolutely from exercising any discretion to award expert witness fees as costs. Such a rule, it is argued, acts as a safety valve by allowing the parties a kind of "fair warning" that expert witness fees will be sought, and an opportunity to object beforehand to unnecessary experts or expenditures. Respondent's Brief at 25.

Petitioners respectfully submit that this reading of Rule 706 and 28 U.S.C. § 1920(6) is as unwarranted as it is unnecessary. Nowhere in the language of those statutes is there any indication that the procedures provided for therein are exclusive. Such a judicial gloss would make little sense. In the first place, a rule allowing district courts to wield their long-standing equitable discretion in this area serves equally as well to alert litigants of the potential for such an award. Secondly, as a practical matter, a district court is unable in many cases to evaluate with certainty the necessity or importance of an expert's testimony until after it has heard such evidence. *See United States v. City of Twin*

Falls, Idaho, 806 F.2d 862, 878 (9th Cir. 1986) ("Because the trial court will be better able to evaluate the importance of expert testimony at the conclusion of the trial, . . . prior application and approval of an enhanced fee for the expert's testimony is not required.").

The losing party's interest in protecting itself against exorbitant awards is adequately protected by objection to the cost award following trial, at which time the court is in the best position to make this determination. The experience in the instant case demonstrates this point well: the trial court reviewed the testimony of each of the three expert witnesses used by defendants at trial and disallowed as taxable costs more than 40% of the fees incurred in connection with that testimony. App. C at 37a. There is simply no logical reason to permit taxation of expert witness fees upon prior application but to deny taxation of essential expert witness fees upon resolution of the case. "Crucial expert testimony remains crucial whether the court makes the determination before or after trial." Stockwell, *supra* at 239. In the majority of cases, it is only at the close of trial that a court will know with certainty whether the expert testimony has performed its intended purpose of assisting the fact finder resolve the issues in the case.

CONCLUSION

Petitioners herein are not asking this Honorable Court to re-write the law, but rather are seeking simple confirmation of the long-standing inherent equitable power of the federal district courts, a power which those courts have consistently exercised with the utmost regard for the prevailing standards governing its proper use. The so-called "exception" posited by Respondent, which is not really an exception at all, will not "swallow the rule." It has not done so in the past, and nothing in the recent experience of the judiciary has indicated that it will do so now or in the future. The district courts of the

United States should be allowed to exercise their equitable discretion to award expert witness fees as taxable costs where the testimony offered by that witness serves its purpose of providing essential assistance to the resolution of the case, and where countervailing considerations do not weigh against such an award. Such considerations, including the indigency or the good faith of the losing party, the absence of a clear victory, and any misconduct or bad faith on the part of the prevailing party, are all factors which have been traditionally considered by the district judge in applying his or her discretion under Rule 54(d). L. Bartell, *Taxation of Costs and Awarding Expenses in Federal Courts*, 101 F.R.D. 553, 559-562 (1983).

All of these factors and many more were carefully considered by the trial judge below in concluding that Petitioners were entitled to an award as taxable costs of the fees of two of the three experts utilized by them at trial. This Court should reverse the holding of the Fifth Circuit Court of Appeals and reinstate the judgment of the trial court in its entirety.

Respectfully submitted, this 22nd day of April, 1987.

DANDO B. CELLINI *
VICTORIA KNIGHT MCHENRY
MCGLINCHEY, STAFFORD, MINTZ,
CELLINI & LANG, PC
643 Magazine Street
New Orleans, Louisiana 70130
Telephone: (504) 586-1200

ERNEST P. MANSOUR
MANSOUR, GAVIN, GERLACK &
MANOS CO., L.P.A.
2150 Illuminating Building
Cleveland, Ohio 44113
Telephone: (215) 523-1500
Attorneys for Petitioners

April 22, 1987

* Counsel of Record